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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 27

F. J. GUNTHER,
Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation,
Respondent.

Brief in Opposition

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QUESTION PRESENTED

Whether an Adjustment Board award rendered in excess of the Board's jurisdiction can be set aside in an enforcement proceeding upon motion for summary judgment.

STATEMENT OF THE CASE

This litigation concerns the refusal of Respondent railroad to return a locomotive engineer to active service upon the advice of its Chief Surgeon that the condition of his heart is such that he may suffer blackouts under the strain of his duties and would be a hazard to his fellow employees and the public. Respondent's locomotive engineers are required to take and pass physical examinations at intervals

of increasing frequency as their age advances. At age 70 this interval is three months. Petitioner took and passed four such quarterly examinations, but was disqualified for active service as a locomotive engineer upon the fifth examination at his then attained age of 71 years (App. B to Petition, page vi; R. 17-18).

Petitioner processed his claim for reinstatement to service and pay for time lost to the First Division, National Railroad Adjustment Board, pursuant to Section 3 First (i) of the Railway Labor Act (45 U.S.C., Section 3 First (i)). That Board declared the interpretation of the applicable agreement rules to be that if the Respondent carrier's medical staff has removed an employee from service in good faith predicated upon a fair and adequate physical examination, there is no right to reinstatement since there was no wrongful removal from service (App. D to Petition, p. xix). Instead of determining whether these guidelines were satisfied in this case, the Board ordered an arbitration of Petitioner's physical condition by a three-doctor panel and subsequently issued its Award and Order No. 17161 on October 8, 1958, simply adopting the purported three-doctor award as its own (App. E to Petition, pp. xxi-xxiii).

Respondent refused to make effective this award and order which circumvented the Board's own findings and imposed upon the carrier an arbitration not provided for in the collective bargaining agreement. Therefore, Petitioner exercised his right to seek enforcement of the purported order pursuant to 45 U.S.C. 153 First (p) by filing the instant action. The District Court and the Court of Appeals for the Ninth Circuit found that instead of interpreting and applying the provisions of the collective bargaining agreement, the Board exceeded its jurisdiction by

writing in a limitation upon Respondent's right to have its employees medically examined in good faith and by ordering an arbitration medical panel wholly without contractual sanction (App. B to Petition, pp. x-xii). Respondent's position is that the Railway Labor Act provides a method of making or changing agreements in Section 6 (45 U.S.C. 156); that Section 6 was invoked by the certified union in 1959 with the result that such an arbitration medical panel was adopted in the applicable agreement; that at no time prior to 1959 was there any such provision; and that the action of the Board was an unwarranted attempt to write an arbitration contract for the parties.

Throughout the one-year period when proceedings took place in the District Court, repeated statements were made to Petitioner by the Court that he should at least specify some evidence or showing which he could make to the Court in opposition to Respondent's affidavits (App. B to Petition, pp. xiii-xiv). Despite these statements, Petitioner did not produce any such affidavit or showing and it was only when he had failed to respond to the District Court's invitation that, on a renewed motion, summary judgment was ordered (App. B to Petition, p. xiv). Only after Petitioner had appealed this judgment did he seek to introduce the affidavits described in his brief on pages 7, 8, 9, 10, 15 and 16 under the guise of "newly discovered evidence". Under FRCP Rule 60(b) both courts below held that the evidence offered (dated 1945-1947, Petitioner's brief, pp. 7, 8) was neither newly discovered nor of such a nature that it could not have been discovered by due diligence in time to move for a new trial (R. 320; App. B to Petition, pp. xiv-xv). The summary judgment and the denial of the motion under Rule 60(b) were affirmed.

REASONS FOR DENYING THE WRIT

1. During the extended period of this litigation in the District Court, Petitioner produced no affidavit or indication of proposed proof that any three-doctor arbitration board was the subject of agreement with Respondent prior to 1959. Hence, any contention that he was deprived of a day in court by summary proceedings is without merit.

Petitioner had ample opportunity to discover and produce evidence to challenge the affidavits of Respondent. The District Court denied Respondent's first motion for summary judgment on March 27, 1961, in an opinion which invited Petitioner to present evidence with respect to any alleged limitation upon the right of Respondent to determine the physical fitness of its employees. (R. 53-55; App. B to Petition, pp. xiv-xv). Notwithstanding this invitation, the Petitioner presented no such evidence to the Court. Thereafter, on May 16, 1961, Respondent filed a second motion for summary judgment (R. 66-67) which was ultimately granted on October 27, 1961 (R. 159) and from which judgment appeal was taken to the Court of Appeals for the Ninth Circuit. While the appeal was pending and on June 5, 1962, Petitioner filed a motion pursuant to Rule 60(b) FRCP which was denied for various reasons, one of which was lack of due diligence (R. 320). In affirming this exercise of the discretion of the District Court, the Court of Appeals noted that Petitioner had failed to produce any evidence and had failed to search or inquire during the period of one year next following denial of the first motion for summary judgment mentioned above (App. B to Petition; pp. xiv-xv).

2. The issue in this case could not have any effect upon the rights of employees under the collective bargaining

agreement from and since 1959 when the union and Respondent carrier negotiated and adopted a three-doctor arbitration panel under the provisions of Section 6 of the Railway Labor Act (45 U.S.C. 156).

It is clear that no limitation existed upon Respondent's right to rely upon its doctor's determination in good faith of the physical fitness of locomotive engineers. The collective bargaining agreement contained no such limitation. The decision of the Adjustment Board itself cited no such provision (App. D and E to Petition, pp. xvii-xxiii). Instead the Board declared: "If the carrier through its medical staff has removed an employee from service in good faith .... there is no right to reinstatement." (App. D to Petition, p. xix). The Board made no finding challenging the good faith of Respondent or its medical staff. Petitioner made no such claim either before the Adjustment Board or in Court (App. B to Petition; Footnote 3 on page x). Similarly it is not contended that the standard of fitness was unfair or not applied to his physical condition, adequately determined. In the face of this record the Adjustment Board exceeded its jurisdictional bounds in ordering arbitration by a panel of three doctors. No supporting agreement provision was cited because none existed. Such a provision was negotiated between the parties in 1959, approximately five years later (App. B to Petition, p. xiv). This new agreement provision would have been unnecessary and unsupported by consideration if the parties already had a three-doctor panel agreement. With this arbitration provision in the contract from and since 1959, the question in the instant case could not recur in connection with other locomotive engineers employed by Respondent.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Dated: December 29, 1964.

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